Wan Zubaidah bt Wan Mahmood (also as representative to the estate of Nik Ab Rahman bin Nik Mat, deceased) & Anor v CIMB Bank Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(A)-831–04 OF 2017
ABANG ISKANDAR, NALLINI PATHMANATHAN AND SURAYA OTHMAN JJCA
11 JUNE 2018

Banking — Loan — Loan facility — Loan facility made by bank — Landed property as security for loan — Default in repayment of loan — Recovery of debt — Enforcement of charge over landed property — When cause of action accrues — Whether bank entitled to claim interest on debt due beyond period of six years — Limitation Act 1953 s 21(1), (5)

Bank Bumiputra Malaysia Bhd (now CIMB Bank Bhd) ('the bank') offered a fixed loan facility of RM130,000 to one Nik Ab Rahman ('the deceased'). As security for the loan, a first fixed charge was registered on a property owned by the deceased in favour of BBMB in 1981. Upon his death, the appellant ('the first defendant') was appointed the personal representative of his estate. The deceased defaulted in the repayment of facilities in the 1980s, after which the bank in 1987 issued the statutory form for the commencement of an order for sale under the National Land Code ('the NLC') vide the issuance of a Form 16D. In 1988, an order for sale was granted by the land administrator after which a first auction was fixed for RM100,000. After a series of unsuccessful auctions, the land administrator issued a certificate of reference to court. The order for sale proceedings were effectively transferred to the High Court vide s 265(3)(b) of the NLC. In 2004, the bank issued a Form 16D against the second defendant. In 2012, the bank filed an originating summons at the High Court. The High Court granted the bank's request to withdraw the originating summons with liberty to file afresh but subject to conditions that: (a) the defendants are allowed to raise factual and legal issues raised in the plaintiff's application in any other subsequent applications to be filed by the plaintiff; (b) the plaintiff furnishes to the defendants computation of accounts showing detailed interest and deposits paid in any public auction held and that was forfeited by the plaintiff; and (c) the defendant was at liberty to raise any objections in respect of the procedure relating to the reference made by the Pentadbir Tanah to the High Court. The bank then filed an originating summons to substitute the order for sale granted by the land administrator. However it was not evident that there was compliance with the order of 24 April 2013 ('the conditional withdrawal order'). The defendant appealed to

this Court against this order for sale. On 29 February 2016, the defendant's appeal was allowed and the decision of the High Court of 4 August 2015 was set aside. This court in effect reiterated that it was incumbent upon the bank to comply with the conditions set out in the conditional withdrawal order of 24 April 2013 issued by the High Court. On 4 April 2017, the same judge who had heard the second order for sale application by the bank, allowed the third application for an order for sale. The defendant maintained that the bank had still failed to comply with the condition of a detailed statement of account. The defendant disputes the now outstanding sum claimed by the bank which stands at RM634,082.10.

Held, allowing the appeal:

(1) The High Court judge erred in fact and law when the statement of account was accepted as providing full details and computation as ordered by the High Court and this court. It was apparent that there are no details prior to the period from 1987 (the date of default) to date. It may well be that there was no access to these details in view of the transfer of this debt vide two vesting orders. However this has not been explained at all by the bank. To that extent it remained incomplete. KA-7 disclosed the mode of computation of interest in respect of the debt. Interest was capitalised and thus became a part of the capital sum. While this may indeed be accurate it was not immediately apparent from a scrutiny of KA-7. There was also no full explanation from the bank in relation to deductions in relation to the land office receipts (see para 29).

(2) It was evident from the chronology set out at the outset that default in the repayment of the facility was sometime in 1987, as this was when the Form 16D was issued. The date when the right to receive the money accrued must mean the date when the borrower defaulted in his repayment obligations resulting in a recall or termination of the facilities. In the instant case, this would appear to have occurred in 1987. Twelve years from 1987 was 1999. As such the time limit for the enforcement of the charge would have expired by the end of 1999 or before 2000, given that there was no specific date of default specified (see paras 32 & 34–35).

(3) The issuance of the Form 16D does not and cannot enable or facilitate the creation of a 'cause of action' for the purposes of limitation. The provisions of the NLC, namely s 256, affords a chargor-debtor an opportunity to remedy the breach before the chargee-bank enforces its right to pursue an order for a judicial sale as statutorily prescribed. As such it cannot or ought not to be equated with the date when the bank's right to receive the money accrued (see paras 41 & 44).

[Bahasa Malaysia summary

Bank Bumiputra Malaysia Bhd (kini CIMB Bank Bhd) ('bank') menawarkan kemudahan pinjaman tetap sebanyak RM130,000 kepada seorang Nik Ab Rahman ('si mati'). Sebagai jaminan pinjaman tersebut, caj tetap pertama didaftarkan atas harta milik si mati yang memihak pada BBMB pada tahun 1981. Setelah kematiannya, perayu ('defendan pertama') dilantik menjadi wakil estetnya. Si mati gagal membayar semula kemudahan pada tahun 1980-an, selepas itu bank pada 1987 mengeluarkan borang berkanun untuk memulakan perintah jualan bawah Kanun Tanah Negara ('KTN') dengan mengeluarkan Borang 16D. Pada 1988, satu perintah jualan diberikan oleh pentadbir tanah selepas lelongan pertama ditetapkan untuk RM100,000. Selepas beberapa lelongan yang tidak berjaya, pentadbir tanah mengeluarkan sijil rujukan ke Mahkamah. Perintah perintah jualan itu dipindahkan ke Mahkamah Tinggi bawah s 265(3)(b) KTN. Pada 2004, bank mengeluarkan Borang 16D terhadap defendan kedua. Pada 2012, Bank memfailkan saman pemula di Mahkamah Tinggi. Mahkamah Tinggi membenarkan permohonan bank untuk menarik balik saman pemula dengan kebebasan untuk memfailkan lagi tetapi tertakluk kepada syarat-syarat: (a) defendan dibenarkan menimbulkan isu-isu fakta dan undang-undang yang dibangkitkan dalam permohonan plaintif dalam mana-mana permohonan berikutnya lain yang akan difailkan oleh plaintif; (b) plaintif memberi kepada pengadu akaun pengiraan akaun yang menunjukkan kepentingan terperinci dan deposit yang dibayar di mana-mana lelongan awam yang diadakan dan yang telah dilupuskan oleh plaintif; dan (c) defendan bebas menimbulkan apa-apa bantahan berkenaan prosedur berhubung rujukan yang dibuat oleh Pentadbir Tanah ke Mahkamah Tinggi. Bank kemudian memfailkan saman pemula untuk menggantikan perintah jualan yang diberikan oleh Pentadbir Tanah. Walau bagaimanapun, tidak jelas jika terdapat pematuhan perintah 24 April 2013 ('perintah pengeluaran bersyarat'). Defendan merayu kepada mahkamah ini terhadap perintah jualan ini. Pada 29 Februari 2016, rayuan defendan dibenarkan dan keputusan Mahkamah Tinggi pada 4 Ogos 2015 diketepikan. Mahkamah ini mengulangi bahawa adalah kewajipan bank untuk mematuhi syarat-syarat yang dinyatakan dalam perintah pengeluaran bersyarat pada 24 April 2013 yang dikeluarkan oleh Mahkamah Tinggi. Pada 4 April 2017, hakim yang sama yang telah mendengar permohonan perintah kedua oleh Bank, membenarkan permohonan ketiga untuk perintah jualan. Defendan menyatakan bahawa bank masih gagal mematuhi syarat penyata perincian terperinci. Defendan kini membantah jumlah yang dituntut oleh bank berjumlah RM634,082.10.

Diputuskan, membenarkan rayuan:

(1) Hakim Mahkamah Tinggi terkhilaf di bawah fakta dan undang-undang ketika penyata akaun diterima sebagai memberikan perincian lengkap dan perhitungan sebagaimana yang diperintahkan oleh Mahkamah

Tinggi dan mahkamah ini. Adalah jelas bahawa tiada butiran sebelum 1987 (tarikh keingkaran) setakat ini. Mungkin tidak ada akses kepada butiran ini memandangkan pemindahan hutang ini melalui dua perintah peletakhakan. Walau bagaimanapun, ini belum dijelaskan oleh bank. Sehingga tahap ini, ia tetap tidak lengkap. KA-7 mendedahkan cara pengiraan faedah berhubung hutang. Faedah dipermodalkan dan menjadi sebahagian daripada jumlah modal. Walaupun ini sememangnya tepat, ia tidak dapat dilihat dengan ketara dari KA-7. Terdapat juga penjelasan penuh daripada bank berhubung pemotongan berhubung dengan resit pejabat tanah (lihat perenggan 29).

(2) Terbukti daripada kronologi yang dinyatakan pada awal lagi bahawa kegagalan membayar balik kemudahan adalah kira-kira tahun 1987, kerana ini adalah ketika Borang 16D dikeluarkan. Tarikh apabila hak menerima wang terakru bermakna tarikh peminjam ingkar dalam kewajipan pembayaran baliknya yang mengakibatkan penarikan balik atau penamatan kemudahan. Dalam kes ini, ia sepatutnya berlaku pada tahun 1987. Dua belas tahun dari tahun 1987 adalah tahun 1999. Oleh itu, had masa bagi penguatkuasaan pertuduhan akan tamat pada penghujung tahun 1999 atau sebelum tahun 2000, memandangkan tiada spesifik tarikh khusus keingkaran yang dinyatakan (lihat perenggan 32 & 34–35).

(3) Pengeluaran Borang 16D tidak dan tidak membolehkan atau memudahkan penciptaan 'kausa tindakan' untuk tujuan had masa. Peruntukan-peruntukan NLC, iaitu s 256, memberi peluang kepada penghutang-pemajak untuk membaiki pelanggaran itu sebelum bank menguatkuasakan haknya untuk meneruskan perintah penjualan kehakiman seperti yang ditetapkan oleh statut. Oleh itu, tidak boleh atau tidak sepatutnya disamakan dengan tarikh hak bank menerima wang yang terakru (lihat perenggan 41 & 44).]

Notes

For cases on loan in general, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3028–3029.

Cases referred to

Lim Ban Hooi & Anor v Malayan Banking Bhd [2018] 5 MLJ 421, CA (refd)
Nasri v Mesah [1971] 1 MLJ 32, FC (refd)
Sivadevi a/p Sivalingam v CIMB Bank Bhd [2018] 5 MLJ 82, CA (folld)
Tenaga Nasional Bhd v Kamarstone Sdn Bhd [2014] 2 MLJ 749; [2014] 1 CLJ 207, FC (refd)

Legislation referred to

Limitation Act 1953 s 21, 21(1), (5), (5)(a), (5)(b)
National Land Code ss 256, 265(3), (3)(b), (3A), Form 16D

Appeal from: Originating Summons No BA-24FC-1096–08 of 2016 (High Court, Shah Alam)

Suria Kumar (Suria Kumar & Co) for the appellant.
Ahmad Zamri (Ooi Hean Ping with him) (Che Mokhtar & Ling) for the respondent.

Nallini Pathmanathan JCA:

INTRODUCTION

[1] This appeal has a chequered history. It relates to the recovery of a debt arising from the grant of a loan facility to one Nik Ab Rahman bin Nik Mat, now deceased as early as 1981. There was default in the repayment of the loan and enforcement of the charge over landed property, namely a house, comprising security for the loan was initiated in 1987. The primary issues in this appeal relate to limitation and the construction to be afforded to s 21(1) and (5) of the Limitation Act 1953, in the context of s 256 of the National Land Code. When does a cause of action accrue for the purposes of s 21(1) of the Limitation Act 1953 in relation to the recovery of land by the enforcement of a charge? Is it when the debt first became due and payable or does such right arise upon compliance with the provisions of s 256 of the National Land Code upon issuance of the Form 16D?

[2] In determining this issue we are guided by the decision of this court in *Sivadevi a/p Sivalingam v CIMB Bank Bhd* [2018] 5 MLJ 82.

FACTUAL MATRIX

[3] On 20 April 1981, Bank Bumiputra Malaysia Bhd ('BBMB') offered a fixed loan facility of RM130,000 to one Nik Ab Rahman bin Nik Mat, now deceased ('the deceased'). The deceased was also the registered owner of a property held under HS(M) 124, Lot No 7663, Mukim Sg Buloh, Daerah Petaling, Selangor Darul Ehsan. As security for the loan a first fixed charge was registered in favour of BBMB on 21 October 1981.

[4] The deceased was the second defendant throughout most of these proceedings, but upon his death, the first defendant, Wan Zubaidah bt Wan Mahmood was appointed the personal representative of his estate.

A **[5]** On 3 September 1999 the business and assets of BBMB were transferred to and vested in the Bank of Commerce (M) Bhd. On 30 September 1999, the latter bank changed its name to Bumiputra-Commerce Bank Bhd.

B **[6]** On 6 September 2006, vide a second vesting order, Southern Bank Bhd and Bumiputra-Commerce Bank Bhd's business and assets were transferred and vested in Bumiputra-Commerce Bank Bhd. Bumiputra-Commerce Bank Bhd then changed its name to CIMB Bank Bhd.

C **[7]** The plaintiff, who is the respondent here, is therefore CIMB Bank by reason of the devolving of the business and assets of BBMB and Bumiputra-Commerce Bank as well as Southern Bank to it vide the two vesting orders ('the bank').

D **[8]** The deceased defaulted in the repayment of facilities in the 1980's, after which the bank on 8 January 1987 and 17 February 1987 issued the statutory form for the commencement of an order for sale under the National Land Code ('the NLC') vide the issuance of a Form 16D.

E **[9]** On 5 October 1988, an order for sale was granted by the land administrator of the Petaling Land Office, after which a first auction was fixed for the 31 October 1988 for RM100,000. A sale was effected at the price of RM119,000 but the purchaser failed to pay the balance purchase price, after which the sale was cancelled by the land administrator.

F **[10]** A second and third auction on 23 December 1993 and 8 September 1994 were fixed with reserve prices of RM156,000 and RM153,000 respectively. The land remained unsold.

G **[11]** On 13 June 2003 deposits previously paid by successful bidders amounting to RM36,538 was forfeited and credited to the account of the borrower.

H **[12]** In view of the unsuccessful auctions, the land administrator issued a 'Certificate of Reference to Court' or 'Sijil Rujukan Mahkamah'. The order for sale proceedings were effectively transferred to the High Court vide s 265(3)(b) of the NLC.

I **[13]** On 31 May 2004, the bank issued a Form 16D against the second defendant. Some eight years later on 26 March 2012, the bank filed an originating summons in the High Court at Kuala Lumpur. The originating summons was amended to include the first defendant as the personal representative of the estate. During the hearing of this originating summons

the bank sought to withdraw its application with liberty to file afresh since it had failed to produce any statement of account.

[14] On 26 April 2013, the learned High Court judge granted the bank's request to withdraw the originating summons with liberty to file afresh but subject to the following conditions. These conditions are of importance because they are relevant to the subsequent appeals that arose. The conditions that were imposed and which the bank was obliged to comply with are, inter alia, as follows:

(a) the defendants are allowed to raise factual and legal issues raised in the plaintiff's application herein in any other subsequent applications to be filed by the plaintiff;

(b) the plaintiff furnishes to the defendants computation of accounts showing detailed interest and deposits paid in any public auction held and that was forfeited by the plaintiff;

(c) defendant is at liberty to raise any objections in respect of the procedure relating to the reference made by the Pentadbir Tanah to the High Court; and

(d) costs in the sum of RM5,000 to be paid by the plaintiff prior to refilling their application.

[15] *It is pertinent that in their written submissions, learned counsel omits to mention this salient matter, namely that the withdrawal with liberty to file afresh was subject to these conditions. Instead, counsel merely states that the originating summons was withdrawn with liberty to file afresh because 'the property was not within the jurisdiction of the court'. This amounted to an omission of a crucial set of facts. Counsel should always set out all material facts whether in their favour or otherwise. If not, this may well amount to misleading the court.*

[16] Following this, on 12 December 2014 the bank filed an originating summons in the High Court at Shah Alam. On 4 August 2015 the High Court granted an order for sale under s 265(3A) of the NLC to substitute the order for sale dated 5 October 1988 granted by the land administrator. However it is not evident that there was compliance with the order of 24 April 2013 ('the conditional withdrawal order'). It was not clear that the bank produced a statement of account displaying details of the amount outstanding, the computation of interest and that credit had been fully accorded to the defendant's debt for deposits that had been forfeited by the bank in respect of failed auctions.

[17] The defendant appealed to this court against this order for sale. On 29 February 2016, the defendant's appeal was allowed and the decision of the

A High Court of 4 August 2015 was set aside. In allowing the defendant's appeal this court made the following orders:

(i) Rayuan Perayu-Perayu di benarkan dengan kos RM10,000 di sini dan di Mahkamah Tinggi Kuala Lumpur Saman Pemula No: 24NCVC-785-03/2012 di bayar kepada Perayu-Perayu oleh Responden;

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(ii) Perintah mahkamah Tinggi Shah Alam, ... bertarikh 4.08.2015 di ketepikan;

(iii) Responden di berikan kebebasan untuk memfailkan semula Saman Pemula yang serupa *dengan syarat mematuhi terlebih dahulu Perintah Mahkamah Tinggi Kuala lUmpur, Saman Pemula No 24NCVC-785–03/2012 bertarikh 26 April 2013 ia itu Responden untuk memaklumkan kepada Perayu Terhadap kiraan yang di kemukakan bersama faedah secara terperinci dengan mencatatkan sebarang deposit yang di bayar dalam sebarang lelongan awam yang* di adakan yang mana telah di rampas oleh Responden; ...

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D

[18] This court in effect reiterated that it was incumbent upon the bank to comply with the conditions set out in the conditional withdrawal order of 24 April 2013 issued by the High Court. The primary condition of relevance here is the computation of the current sum stated to be outstanding by the bank particularly in relation to:

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(a) computation of interest element; and

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(b) crediting of forfeited deposits from failed auctions to the defendant's account.

[19] The bank through its solicitors sent a copy of such statement of account as it had on 1 July 2016. It then went on to file a third application to substitute the land administrator's order for sale with an order for sale from the High Court on 2 August 2016 ('the third application for an order for sale'). It is this third application which comprises the subject matter of the present appeal.

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[20] On 4 April 2017, the same judge who had heard the second order for sale application by the bank, allowed the third application for an order for sale.

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[21] The defendant maintained that the bank had still failed to comply with the condition of a detailed statement of account. This because, the defendant alleges:

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(a) the bank produced a five page statement commencing from May 2000, when in fact the defendant had an account with the bank from October 1981. Therefore the statement of account was incomplete as no accounts prior to May 2000 had been produced;

(b) the computation of interest on the fixed loan was supposed to be on a yearly rest basis while the statement of account shows that the computation of interest is on a monthly or daily rest basis; and

(c) the bank had failed to take into account several deposit payments between 1988–1994 amounting in total to RM60,950 and credit these sums to the defendant's account.

[22] For these reasons, the defendant disputes the now outstanding sum claimed by the bank which stands at RM634,082.10. The defendant maintains that the forgoing matters are sufficient to amount to cause to the contrary precluding the grant of an order for sale.

[23] Additionally the defendant maintained that the Bank was estopped from claiming interest accruing after a period of six years *from the date of default* pursuant to s 21(5) of the Limitation Act 1953.

[24] Further, the defendant maintained that the bank could not obtain an order for sale in respect of the subject property as it was barred by limitation under the provisions of s 21(1) of the Limitation Act 1953 from commencing such proceedings.

THE DECISION OF THE HIGH COURT

[25] The learned High Court judge in determining the third application for an order for sale, which is the subject matter of this appeal, undertook a detailed analysis of the entire matter. In respect of the statement of accounts the learned judge produced the five page statement and undertook an analysis of the account over the period from 2000 to date. She found that the quantum of the debt brought forward as of June 2000 reflected the amount brought forward from the old account. The interest she concluded was correctly stated to be 10%. Her Ladyship concluded that as of 28 June 2016, the relevant date, the arrears of RM634,082.10 was correctly stated. As such she concluded that the statement of accounts contained the relevant particulars and complied with the order of the High Court and the Court of Appeal.

[26] The second issue in relation to whether the relevant deposits from failed auctions were taken into account the learned judge undertook a detailed analysis that went outside of the scope of the submissions and issues raised by the parties. The defendant produced land office receipts that were not, it was maintained, taken into account in determining the debt due and owing. The plaintiff did not object to the genuineness of these receipts. However the learned judge concluded from her analysis that these receipts were not genuine. In so doing she erred in law in taking it upon herself to ascertain and rule on

matters not raised by either of the parties. This, to our minds, amounted to a misdirection.

[27] With respect to the other matters raised by the defendant to substantiate 'cause to the contrary' the learned judge concluded that these matters could not be raised because they had been considered by this court in the course of appeal, and therefore amounted to res judicata.

[28] In so concluding the learned judge erred in law as the defendant's right to raise other legal and factual matters to establish cause to the contrary was specifically preserved by the order of the High Court dated 26 April 2013. This in turn was specifically preserved by this court in its order of 29 February 2016. These matters were not specifically determined conclusively by this court. They remain open for consideration at this juncture albeit by the court below or this court.

OUR ANALYSIS

[29] We have considered the decision of the learned High Court judge and would concur with learned counsel for the appellant that Her Ladyship erred in fact and law when:

(a) the statement of account in KA-7 was accepted as providing full details and computation as ordered by the High Court and this court. It is apparent that there are no details prior to the period from 1987 (the date of default) to date. It may well be that there is no access to these details in view of the transfer of this debt vide two vesting orders. However this has not been explained at all by the bank. To that extent it remains incomplete;

(b) neither does KA-7 disclose the mode of computation of interest in respect of the debt. It has been stated by the bank that interest was capitalised and thus became a part of the capital sum. While this may indeed be accurate it is not immediately apparent from a scrutiny of KA-7;

(c) neither is there a full explanation from the bank in relation to deductions in relation to the land office receipts. The analysis undertaken by the learned judge of her own accord ought not to be taken into account as it was not raised by the bank. Such conclusions moreover cannot be made out on the basis of affidavit evidence;

(d) the most significant issues which arose for consideration in the course of the appeal was whether the recovery of land by way of an order for sale was in fact available to the bank after the expiry of twelve years pursuant to s 21(1) of the Limitation Act 1953; and

(e) in like vein it is unclear whether the bank is entitled to claim interest

beyond a period of six years in view of the express provisions of s 21(5) of the Limitation Act 1953. A

[30] In point of fact the latter two issues ultimately comprised the main issues in contention before us during the appeal. We requested counsel for both parties to submit further submissions in relation to issues (d) and (e) above. B

ISSUE (D): WHETHER PROCEEDINGS FOR THE RECOVERY OF LAND BY WAY OF AN ORDER FOR SALE ARE AVAILABLE TO THE BANK AFTER THE EXPIRY OF TWELVE YEARS PURSUANT TO S 21(1) OF THE LIMITATION ACT 1953? C

[31] Section 21(1) provides in essence that proceedings for the recovery or enforcement of security by way of a charge over land carries a limitation period of 12 years. It provides as follows: D

> 21 Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land
>
> (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued. E

[32] In the instant case it is evident from the chronology set out at the outset that default in the repayment of the facility was sometime in 1987, as this was when the Form 16D was issued in respect of the proposed auction sale under the land administrator pursuant to the provisions of the NLC. F

[33] Section 21(1) envisages that: G

(a) any action to recover the principal sum secured by a charge is to be initiated within 12 years from the date when the right to receive the money accrued; and

(b) the enforcement of a charge on land is not to be effected after the expiration of twelve years from the date when the right to receive the money accrued. H

[34] The date when the right to receive the money accrued must mean the date when the borrower defaulted in his repayment obligations resulting in a recall or termination of the facilities. In the instant case, this would appear to have occurred in 1987. I

[35] In the instant case the subject charge was first sought to be enforced vide

the issuance of a Form 16D in 1987. Twelve years from 1987 is 1999. As such the time limit for the enforcement of the charge would have expired by the end of 1999 or before 2000, given that there is no specific date of default specified.

[36] It might be argued by the bank that the correct date from which to compute the limitation period is the date when the Form 16D was issued in respect of the commencement of proceedings under s 256 of the NLC, after the issuance of the 'Sijil Rujukan Mahkamah' by the land administrator on 4 May 2004. However it has to be borne in mind that the substitution of the proceedings pursuant to s 265(3)(b) of the NLC to order for sale proceedings in the High Court pursuant to s 256 does not amount to the accrual of a cause of action as is envisaged in computing when time begins to run for the purposes of limitation.

[37] This is because in accordance with well accepted authorities on the computation of the limitation period (see *Nasri v Mesah* [1971] 1 MLJ 32 and *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749; [2014] 1 CLJ 207), time begins to run from the date when '... the right to receive the money accrued' pursuant to s 21(1) of the Limitation Act 1953.

[38] In *Nasri v Mesah*, the Federal Court held that 'a cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought'. It went on to hold that: "the right of action accrues' means one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run'.

[39] In the instant case, it is undisputable that the right to receive the debt from the second defendant accrued as early as 1987 when the second defendant as borrower defaulted on repayments in respect of the loan facility.

[40] It was in that context that the first Form 16D was issued so as to enable the bank as chargee to commence proceedings under s 265(3) given that the sale of the subject land was to be dealt with by the land administrator.

[41] As such the issuance of a fresh Form 16D in 2012, after a delay of some eight years does not denote the date when the right to receive the monies accrued. In other words the issuance of the Form 16D does not and cannot enable or facilitate the creation of a 'cause of action' for the purposes of limitation.

[42] As stated by this court in *Sivadevi a/p Sivalingam v CIMB Bank Bhd* [2018] 5 MLJ 82 in relation to the purpose of the Form 16D (see para 58 of the

judgment, midway):

> ... The notice is intended to first indirectly remind the charger of his obligations by pointing out the specific breach; telling the charger to remedy the breach within the time period specified in the notice; before finally warning the chargor that if the notice is not complied with, proceedings to obtain an order for sale will be sought. Where the chargor does not heed the requirements in the notice the charge is then entitled to apply for an order for sale under s 256.
>
> [59] The above sets out the mechanism or the process that must be followed before the chargor may apply to the court for an order for sale of the charged property. But, in sofar as how long has the chargor got before the chargor may get round to enforcing that right to seek an order for sale is concerned, the provisions of the Limitation Act 1953 will have to be considered. According to the decisions in *Peh Lai Huat v MBf Finance Bhd* and *Jigarlal K Doshi @ Jigarlal a/l Kantilal v Resolution Alliance Sdn Bhd & Anor*, s 21(2) operates only from when the chargor fails to remedy the default or breach as specified in the Form 16D notice.

[43] This court in *Sivadevi*'s case when on to consider in detail the interplay between the contractual rights of recovery of a debt under the charge documentation ie the substantive contractual rights of the parties versus the provisions of the NLC (see paras 60–76 of the judgment). It concluded:

> Sections 254–256 (of the NLC) provide for the procedure, method, mechanism, manner or means of enforcing the right for an order of sale. However, the substantive right of the chargee to approach the Court for the remedy of an order for sale of the charged land is still dependent on the remedy of an order for sale of the charged land is still dependent on there being a breach of the express or implied agreements. The express agreements are to be found in the charge documents while the implied agreements are as provided under s 249 of the National Land Code.
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> As expounded by the Federal Court in *S&M Jewellery Trading Sdn Bhd v Fui Lian-Kwong Hing Sdn Bhd*, the right to pursue the statutory remedy of sale is triggered by the event of breach or default in the underlying contractual agreement and in the terms of the charge ...

[44] This court concluded that the provisions of the NLC, namely s 256, affords a chargor-debtor an opportunity to remedy the breach before the chargee-bank enforces its right to pursue an order for a judicial sale as statutorily prescribed. As such it cannot or ought not to be equated with the date when the bank's right to receive the money accrued. In short the date when the debt first arose for the purposes of computation of a limitation period and the date when the bank affords the chargor-debtor notice that if he does not remedy the breach, the bank is going to proceed to enforce its rights by way of judicial sale are two different dates that serve different purposes. The latter is procedural or adjectival, while the former marks the trigger of a substantive contractual right to receive a debt.

[45] More significantly, the latter (ie the issuance of a Form 16D under s 256 of the NLC) cannot be utilised interchangeably with the first (ie the date when the bank gives notice to the debtor of a fundamental breach namely default in the repayment of the debt entitling the bank to recall the entire loan and terminate the loan facility) so as to conclude that time starts to run from the date when the Form 16D was issued for the purposes of computation of the limitation period, as extensively and comprehensively explained by this court in *Sivadevi*'s case as well as *Lim Ban Hooi & Anor v Malayan Banking Bhd* [2018] 5 MLJ 421.

[46] For these reasons we are of the considered view that the bank's application for a judicial sale under s 256 of the NLC is caught by limitation under the provisions of s 21(1) of the Limitation Act 1953. As such the bank is unable to enforce its charge in view of the fact that more than 12 years have accrued since the date when the default in the repayment of the debt arose in 1987. It is to be noted that the relevant date is the date of default in repayment and not the date of issuance of the Form 16D.

[47] In so concluding, we followed and adopted the reasoning in *Sivadevi*'s case, which, with respect, we concur. It is of considerable importance that the adjectival provision in s 256 of the NLC is not utilised to circumvent the substantive legal provisions of the Limitation Act 1953. It bears repetition that s 256 of the National Land Code serves the specific purpose of providing notice of the chargee's intention to initiate a judicial sale of the charged land to the debtor. It therefore affords the debtor an opportunity to remedy his failure to repay the debt. It does not amount to the actual enforcement of the creditor's substantive legal right. That will only ensue upon the pronouncement and effecting of an order for sale judicially.

[48] By contrast, the provisions of the Limitation Act 1953 in s 21 prescribe substantive legal rights because it provides that the creditor or chargee cannot pursue any right created by a charge over land after the expiry of a period of twelve years. To that extent it statutorily brings to an end the substantive rights of the chargee to recovery of its debt by way of a judicial sale after a period of twelve years from when the debt first became due. This affords finality and certainty to commercial banking law. That right cannot easily be displaced. It ought not to be displaced simply because a creditor chooses to issue a form indicating that it is about to enforce its rights, if such notice comes well after the period statutorily prescribed by Parliament under the Limitation Act 1953, this would amount, in effect, to a circumvention of s 21. That ought not to be countenanced. To do so would be to give a creditor a free rein as to when it chooses to enforce its rights as chargee. This could theoretically ensue for an indeterminate period. Apart from contravening the express provisions of the Limitation Act 1953, it would cause undue prejudice and hardship to the

debtor, who would be burdened with a far increased sum than that envisaged by the initial loan in view of the levy of interest. And that is precisely the case here, where the initial debt was in the region of RM180,000 and now stands at no less than RM643,000 odd, some 30 years later.

[49] This brings us to the issue of the levy of interest over this period.

FOR WHAT PERIOD OF TIME IS INTEREST ON THE DEBT DUE RECOVERABLE UNDER THE PROVISIONS OF S 21(5) OF THE LIMITATION ACT 1953?

[50] This question may well be academic given our conclusion above, namely that the entire debt is time barred under s 21(1) of the Limitation Act 1953.

[51] However an application of s 21(5) provides that no recovery of arrears of interest payable in respect of a sum of money secured by a charge may be brought after the expiry of six years from the date when then interest became due. The provisos in sub-s (a) and (b) are not applicable in the instant case.

[52] It would therefore follow that no arrears of interest is recoverable for a period of six years from 1987, which is the date we have identified as that when the cause of action accrued, or when the debt was first due and repayable to the bank. It is the relevant date for the purposes of computation of the limitation period.

[53] It is therefore immediately apparent that the bank's claim for interest over a period of almost 30 years, more so compounded interest at rates that are not immediately discernible from the statement of account produced, runs awry of and contravenes the provisions of s 21(5).

[54] For this reason too we are again not convinced that the bank is entitled to an order for sale as sought vide the originating summons filed. We are of the unanimous view that the learned judge erred in granting the prayers sought, for the reasons set out above. On the contrary it would appear that the debtor has more than sufficiently established cause to the contrary as provided under the NLC.

[55] As such the appeal is allowed and the order of the High Court is set aside. Costs are awarded to the appellant in the sum of RM8,000 subject to allocatur. The deposit is refunded.

Appeal allowed.

Reported by Afiq Mohamad Noor